Supreme Court, U.S.
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In The

Supreme Court of the United States

H. C. MASSEY, EXECUTIVE DIRECTOR
OF THE OGDEN UTAH ("UTAH AREA")
COMMUNITY ACTION COMMITTEE, INC.,

Petitioner,

v.

BOARD OF TRUSTEES OF THE OGDEN AREA
COMMUNITY ACTION COMMITTEE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

JANET HUGIE SMITH
Counsel of Record
SCOTT A. HAGEN
LISA A. YERKOVICH
RAY, QUINNEY & NEBEKER
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

Attorneys for Respondent Board of Trustees of the Ogden Area Community Action Committee, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Does the "entanglement" test recognized in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 121 S.Ct. 925 (2001), alter the Tenth Circuit's decision upholding summary judgment in favor of Ogden Area Community Action Committee on Petitioner Massey's Section 1983 claim?

II. Did Petitioner Massey establish that Ogden Area Community Action Committee acted under color of state law when it terminated Massey's employment?

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceedings.

The Ogden Area Community Action Committee, Inc. is a private non-profit corporation.

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STATEMENT OF THE CASE

On or about October 27, 1997, H. C. Massey ("Massey") and some individual members of the Board of Trustees of the Ogden Area Community Action Committee, Inc. ("OACAA" or the "Board")[1] filed an action in the U.S. District Court for the District of Utah, seeking to change the membership of the Board of Trustees and to overturn the Board's suspension of Massey from his duties as OACAA's Executive Director. After his termination, Massey amended his lawsuit to allege that he was terminated in violation of his right to due process under 42 U.S.C. § 1983.

OACAA is a private non-profit corporation established to assist low-income residents of Ogden, Utah, and the surrounding area. It is a "community action agency" under 42 U.S.C. § 9902(1). The federal government funds the following OACAA programs: Headstart, Community Service Block Grants ("CSBG") and the Weatherization Program. These programs comprise substantially all of OACAA's funding. The state administers CSBG and Weatherization, while the federal government administers Headstart.

OACAA operates through a board of trustees. The Board is all volunteer and is divided among three groups: (1) at least one-third from low-income sector (elected from neighborhoods); (2) at least one-third from the

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[1] Although the legal name of Respondent is Ogden Area Community Action Committee, Inc., it is commonly referred to as the Ogden Area Community Action Agency. The Board refers to it as "OACAA."

"public sector" (either an elected official (or representative thereof) or an appointed official); and (3) the remainder from the private sector ("officials or members of business, industry, labor, religious, welfare, education, or other major groups and interests in the community"). 42 U.S.C. § 9904(c)(3)(A).

The state monitors OACAA and provides training. Although the state can reduce or terminate the Weatherization or CSBG funding, it may do so only after giving notice and a formal hearing. 42 U.S.C. § 9904(c)(11). Any reduction or termination must then be approved by the U.S. Secretary of Health and Human Services ("HHS"). *Id.*; 42 U.S.C. § 9905a(b). The state has no power to liquidate OACAA or terminate any board member or employee, as OACAA is a private non-profit corporation.

Ann Kagie, Director of the Community Service Office of the Utah State Department of Community and Economic Development, was chief administrator of the Community Service Block Grant Program ("CSBG") for Utah. On occasion, Kagie attended OACAA board meetings and provided technical assistance to the Board.

In December 1996, OACAA submitted a required quality improvement plan to HHS on its Headstart program. The plan was rejected. On May 15, 1997, Beverly Turnbo, HHS Regional Administrator, wrote to the Board and listed numerous deficiencies in OACAA's performance, including the fact that the Board was not properly constituted. In the letter, Turnbo also demanded that OACAA's executive director, Massey, be dismissed.

During December 1996, the state also gave OACAA notice of its intent to terminate the Weatherization contract based on OACAA's failure to properly administer the program. In March 1997, the state gave notice to OACAA of its intention to terminate the CSBG contract for failure to comply with federal regulations. The state also advised the Board that it would not make this recommendation if the Board agreed to a corrective action plan that would restore OACAA to compliance with applicable regulations. In addition, the state advised the Board of an appeal procedure if the Board chose not to accept the corrective action plan.

On May 21, 1997, Massey addressed the Board regarding the threatened loss of Headstart, CSBG and Weatherization funding. The Board decided to conduct a feasibility study regarding Massey's tenure as Executive Director, but it did not do so. Instead, the Board voted in June to retain Massey, notwithstanding the federal ultimatum. The Board also instructed Massey to appeal HHS's determination to cancel the Headstart contract. In short, Massey had been retained as executive director, despite the fact that, under his leadership, OACAA was having serious problems evidenced by the potential loss of substantially all funding and an explicit ultimatum from the federal government that he be replaced.

Ann Kagie assisted the Board in reconstituting itself in accordance with federal law. Kagie worked with the Board Chair, Don Carpenter, Ph.D, an African-American. No evidence exists that any non-minority candidate for a Board position was selected over a minority candidate.

Moreover, no evidence exists that before Massey's termination any existing low-income Board member was dismissed from the Board or that any such member voluntarily resigned. Kagie also assessed OACAA's management and found deficiencies that she communicated to Carpenter and the Board.

In August 1997, three OACAA employees made charges against Massey. The charges included harassment of employees, unfair hiring practices, unfair lunch break rules, wage violations, unfairly "docking" annual leave, forging signatures, making racial slurs, enlisting employees to collect derogatory information about others, enlisting employees to pose as authors of articles Massey wrote regarding his own performance, making negative religious comments, humiliating staff, violating staff privacy, backdating documents, fostering conflicts between employees, imposing unfair time clock rules, and unlawfully failing to pay overtime.

On August 19, 1997, the Board placed Massey on paid administrative leave and hired an independent attorney experienced at investigating EEO complaints to investigate the charges of the OACAA employees against Massey. The investigator met with numerous current and former OACAA employees, the three complaining employees, Massey and his attorney, and two Board members.

In September 1997, while Massey was on administrative leave, OACAA appealed the state's determination to cancel the CSBG contract. It was only after the Board

made significant changes in compliance with the correction action plan that the state decided not to cancel OACAA's CSBG funding.

On November 16, 1997, the independent investigator delivered her report to the Board. The investigator found a majority of the employees' charges against Massey were supported by substantial evidence. No evidence exists of a connection between any state official and the investigator or the results of the investigation.

On November 26, 1997, the Board voted to terminate Massey's employment. In a termination letter of December 2, 1997, the Board referred to the charges and Massey's overall performance. The key factor in the termination was the investigator's report finding substantial evidence to support the serious charges made by employees against Massey. The Board also advised Massey in the termination letter that he could appeal his termination at the December 10, 1997 Board meeting.

Massey and his attorney were invited to the December 10 Board meeting. At the meeting Massey's attorney objected that the Board was not impartial because it had made the initial determination decision based on the investigator's report. Massey's attorney then asked if the investigator and the three complaining employees were present but made no objection on that basis. Massey had not submitted any prior request orally or in writing for any witnesses. Massey's attorney also commented on the lack of time, but did not ask for a continuance or for more time at the hearing, and had not asked for any particular

amount of time before the hearing. Massey and his attorney then left without addressing the merits of Massey's termination.

By Order dated November 13, 1998, the district court dismissed Massey's claims dealing with the composition of the Board of Trustees as state law claims over which the court had no jurisdiction. The parties then conducted discovery on the Section 1983 claim. By Order dated February 3, 2000, the district court granted the Board's motion for summary judgment and dismissed Massey's Section 1983 claim because Massey failed to raise a genuine factual dispute as to his claim of state action in his termination.

The Tenth Circuit affirmed summary judgment on Massey's Section 1983 claim because he failed to show that OACAA acted under color of state law. Accordingly, Massey was unable to establish a genuine dispute of material fact regarding whether the termination was state action for the purposes of his Section 1983 claim.

Massey's Petition seeks review of the Tenth Circuit decision affirming summary judgment for OACAA on Massey's claim under 42 U.S.C. § 1983. On pages 11 and 12 of the Petition, Massey gives examples of how the Tenth Circuit allegedly usurped the factfinder's role. *Massey v. Bd. of Trustees of the Ogden Area Community Action Committee, Inc.*, No. 00-4037 (10th Cir. 2001), *petition for cert. filed*, No. 01-0058. However, Massey's examples are not only immaterial to the grant of summary judgment in favor of OACAA, they are also inaccurate. Massey's first point, that he was working hard to address HHS's concerns regarding OACAA's Headstart program,

is unsupported by the undisputed facts before the lower courts. Petition at 11. HHS approved a revised quality improvement plan by letter dated November 28, 1997, based on a November 3-5, 1997 review. Because Massey had been continuously on administrative leave since August 19, 1997, he could not have contributed to the positive result.

Massey's assertion in point 2 that he was involved in blocking the state's notice of intent to terminate CSBG funding, again, is misleading and not supported by the record. Massey was on paid administrative leave when OACAA appealed the state's decision to cancel the CSBG contract. *Id.*

Finally, in point 3, Massey claims that he came forward with evidence that "the charges against him were false." *Id.* at 12. To the contrary, Massey submitted *no* reliable evidence of this. In fact, although Massey met for two days with the investigator and his attorney and had the opportunity to appeal the Board's termination decision, he presented no evidence and no argument at the December 10, 1997 Board meeting. Other than stating the Board was biased, Massey and his attorney refused to participate further.

Notwithstanding Massey's attempts to challenge the Tenth Circuit's decision, there is no cause for review in this case. The issues are unremarkable, the evidence does not support Massey's statement of the facts, and the Tenth Circuit correctly decided the case.

REASONS FOR DENYING THE WRIT

I.

THE ENTWINEMENT TEST RECOGNIZED IN *BRENTWOOD ACADEMY* DOES NOT CHANGE THE OUTCOME OF THE TENTH CIRCUIT'S DECISION.

This Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, et al.*, 531 U.S. 288, 121 S. Ct. 924 (2001), does not warrant granting this Petition. No conflict exists between the *Brentwood Academy* case and the Tenth Circuit's upholding summary judgment for OACAA in this case. Massey opines that in *Brentwood Academy* "the Supreme Court seemed to adopt a different rule" with regard to determining state action. Petition at 5. The entwinement test, however, is simply another possible way to evaluate whether a private entity is acting under color of state law. *Brentwood Academy,* 121 S. Ct. at 934.

Massey is also mistaken in asserting that confusion exists over a plaintiff's burden under 42 U.S.C. § 1983. *Id.* No clarification by this Court is necessary. Like the other tests used to determine state action, the applicability of the entwinement test is made on a case-by-case basis. *Id.* at 930 (a host of facts can bear on the fairness of attributing activity to the government). In the Petition, Massey is merely attempting to repackage the failed argument he made to the Tenth Circuit under the "nexus" and "symbiotic relationship" tests. Petition at 4-9. Even if the "entwinement" test were applied to Massey's Section 1983 claim, Massey's claim would fail.

State action exists under the nexus test if "there is a sufficiently close nexus between the State and the

challenged action of the regulated entity so that the action of the [regulated entity] may be fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (citations omitted). State action exists under the symbiotic relationship test if the state and the private party are so dependent upon each other that the state is viewed as a joint participant in the challenged conduct. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972) (citations omitted). These tests differ from the entwinement test in that under the entwinement test, state action exists if the private character of an entity is "overborne by the pervasive entwinement of public institutions and public officials in its composition and workings." *Brentwood Academy*, 121 S. Ct. at 932.

Massey argues that because one-third of OACAA's Board members are from the public sector, because Ann Kagie, a state employee, attended four out of twelve board meetings (one meeting was after Massey's termination), and because the state monitors OACAA and provides training,[2] there is state action under the entwinement test. Petition at 8. This argument was not sufficient to establish state action under the nexus or symbiotic relationship tests, and it certainly fails to establish pervasive entwinement of public institutions and public officials in OACAA's composition and workings required under the entwinement test. In short, Massey has not

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[2] Massey incorrectly describes OACAA's relationship with the state. Although the state can reduce or terminate federal funding, it may do so only after giving notice and a formal hearing. 42 U.S.C. § 9904(c)(11). And the federal government must approve any reduction or termination in funding. *Id.*; 42 U.S.C. § 9905a(b).

come forward with any evidence to establish that the termination of his employment should be considered state action because of the pervasive "entwinement" of state officials in the structure of OACAA.

It is undisputed that only one-third of OACCA's board is made up of individuals from the public sector. In *Brentwood Academy*, on the other hand, 84% of the Tennessee Secondary Athletic Association ("Tennessee Association") was made up of representatives of public schools. *Id.* at 932. Further, the public school officials controlled and "overwhelmingly perform[ed]" all but the purely ministerial acts by which the Tennessee Association existed and functioned. *Id.* at 932. There is no evidence that any state entity, agent, or employee had this extensive control over OACAA's Board.

In *Brentwood Academy*, this Court also found that "the public schools have largely provided for the [Tennessee] Association's financial support" and that the Tennessee Association enjoyed "the school's moneymaking capacity as its own." *Id.* at 932. Thus, through the activity funding, the Tennessee Association was explicitly an arm of the state of Tennessee. The same cannot be said of the relationship between OACAA and the state of Utah. In fact, federal funds, not state, substantially comprise all of OACAA's funding.

Moreover, in *Brentwood Academy*, the state of Tennessee assigned state Board of Education members ex officio to serve on the board of control and legislative council of the Tennessee Association. *Id.* Even the Tennessee Association's ministerial employees were treated as state employees, as they were able to participate in Tennessee's

state retirement system. *Id.* at 933. The record in this case is void of any such relationship between OACAA's Board and the state of Utah.

And, unlike the *Brentwood Academy* case, there is no evidence here of state regulation. Rather, the undisputed facts show that OACAA hired an outside independent attorney to investigate the charges made by three OACAA employees against Massey. The independent investigator found that the majority of charges were supported by substantial evidence, and OACAA's Board then voted to terminate Massey's employment. In summary, state action does not exist here because OACAA is not overborne by the pervasive entwinement of the state and its officials in OACAA's composition and workings. Thus, Massey's claim fails under the *Brentwood Academy* analysis.

II.

ANN KAGIE'S INVOLVEMENT IN BOARD ACTIVITIES IS NOT STATE ACTION.

Massey has acknowledged that government funding alone of an employer does not make the employer's personnel decisions state actions. Massey claims, however, that state official Ann Kagie controlled the Board to such an extent that the Board's decision to terminate Massey should be considered an act of the state. Again, Massey's argument fails because he has no evidence to support his allegations about Kagie.

In *Lugar v. Edmondsen Oil Co.*, this Court set forth the following two-part test to determine whether conduct

allegedly causing the deprivation of a federal right may be a state action:

> First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

457 U.S. 922, 937 (1982). The first prong of this two-part test requires Massey to show that his own termination was a specific decision attributable to the state, not merely that state officials generally had influence over the Board. *Id.* at 937. The state's obligation with OACAA was to monitor compliance with federal regulations; however, this does not imply that the state would be responsible for individual personnel decisions. In other words, the state can require results without becoming responsible for the community action agency's methods of achieving those results.

Furthermore, there is simply no evidence that Kagie controlled the Board. Of the twelve Board meetings that occurred during the Massey ordeal, Kagie was listed as present at only four, and one of the four meetings was held after Massey was terminated. When Kagie was present at the Board meetings, she said nothing about Massey but discussed issues such as CSBG rules regarding the ownership of the building housing OACAA, the CSBG cost allocation plan, and the importance of holding fair and democratic low-income elections and accepting the elected representatives of the low-income communities.

Although Massey claims that the state played a major role in altering the composition of the Board by removing persons from the Board who would have voted to retain him and putting others on the Board who voted to terminate his employment, he has failed to identify a single Board member either removed from the Board or added to the Board at the state's request. There is no connection at all between any act of the state and the appointment or dismissal of any Board member.

Massey also claims that through Ann Kagie, the state engineered his termination. However, there is no evidence of any encouragement from the state or Kagie that Massey be terminated. Furthermore, Massey is unable to point to any evidence of a connection between the state or Kagie and the three employees who made the charges against him. Finally, there is no evidence the state or Kagie in any way influenced the Board's selection of the qualified independent investigator or even the Board's decision that an investigator should be retained.

Lugar requires that there be a showing that the deprivation was in some sense attributable to a governmental decision. *Lugar*, 457 U.S. at 938 and n.20. Massey cannot show that the alleged deprivation of his employment resulted from a governmental rule, policy, or decision. To the contrary, all the evidence indicates that Massey's employment was terminated after the independent investigator reported the results of her investigation on the employees' charges against Massey.

Because Massey failed to meet the first prong of the *Lugar* test, he failed to show state action here. Accordingly, the Petition must be denied.

III.

THE TENTH CIRCUIT APPLIED SETTLED LAW IN AFFIRMING SUMMARY JUDGMENT FOR OACAA ON MASSEY'S SECTION 1983 CLAIM.

Massey has not come forward with any evidence that OACAA acted under color of state law when it terminated his employment. To the contrary, the evidence shows that Massey's termination was directly caused by charges of misconduct asserted by three OACAA employees. The charges were brought to the Board's attention in August 1997, two months after the Board voted to retain Massey, despite the potential loss of substantially all funding due to OACAA's alleged failure to comply with regulations that govern such funding. There is no evidence of any connection between the state and the charges against Massey or the employees who asserted the charges.

In response to the employees' charges about Massey, the Board placed Massey on paid leave and hired an independent investigator to review the matter. The independent investigator, a licensed attorney, conducted an exhaustive investigation, interviewing numerous witnesses, including current and former employees and Board members. The investigator also interviewed Massey for two days with his lawyer present. The independent investigator's report detailed "substantial evidence" that supported most of the findings. No evidence exists of any connection between the state and the report from the independent investigator.

After reviewing the report, the Board met and terminated Massey's employment by a majority vote. No evidence exists that there was a state connection to the vote, and no evidence exists of any other immediate cause of Massey's termination. Thus, Massey's termination was not a result of Massey's exercising any right, privilege, or rule of conduct having its source in state authority. *Lugar*, 457 U.S. at 937. Massey's termination was directly caused by charges of misconduct asserted by three OACAA employees.

Massey failed to come forward with any evidence of a connection between the state and the charges against him or the employees who asserted the charges. Without a state connection to the termination, there is no state action, and without state action, there is no claim under Section 1983. Accordingly, this Court should refuse to grant Massey's Petition.

CONCLUSION

The *Brentwood Academy* decision has no effect on the Tenth Circuit's granting summary judgment in favor of OACAA. In *Brentwood Academy*, this Court merely set forth another test under which a Section 1983 plaintiff can establish state action – the entwinement test. In his Petition, Massey asks this Court to reconsider the arguments he made below in light of its decision in *Brentwood Academy*. This Court should decline to do so. Massey simply cannot show that the private character of OACAA was

"overborne by the pervasive entwinement of public institutions and public officials in its composition and workings." Furthermore, Massey cannot show that the termination of his employment resulted from Massey's exercise of a state right, privilege or rule of conduct. To the contrary, Massey's termination resulted from the independent investigator's substantiation of three employees' charges against him.

In summary, there is no cause for review in this case, the evidence does not support Massey's statement of facts, and the Tenth Circuit correctly upheld the grant of summary judgment for OACAA. Therefore, Massey's Petition must be denied.

DATED: September 7, 2001.

Respectfully submitted,

JANET HUGIE SMITH
SCOTT A. HAGEN
LISA A. YERKOVICH
RAY, QUINNEY & NEBEKER
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145-0385
(801) 532-1500

Attorneys for Respondent Board of Trustees of the Ogden Area Community Action Committee, Inc.